91-1621

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

STANLEY LEE SLIGH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND THIS COURT'S HOLDING IN JENKINS V ANDERSON, 447 US 213 (1980), PERMITTING THE PROSECUTION'S USE OF AN ACCUSED'S PREARREST SILENCE TO IMPEACH HIS CREDIBILITY ON CROSS-EXAMINATION, MAY THE PROSECUTION USE OMISSIONS FROM THE ACCUSED'S PREARREST STATEMENT TO POLICE AS SUBSTANTIVE EVIDENCE IN ITS CASE-IN-CHIEF?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN

Petitioner,

vs.

STANLEY LEE SLIGH,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the State of Michigan, entered in this cause on October 14, 1987 rehearing denied on October 3, 1991, leave to appeal denied by the Michigan Supreme Court on January 31, 1992, one justice dissenting.

OPINIONS BELOW

The final Opinion on remand of the Michigan Court of Appeals is unreported, and appended below as Appendix A; the order of the Michigan Supreme Court denying Respondent leave to appeal is unreported as yet, and is appended below as Appendix B. The initial opinion of the Michigan Court of Appeals is unreported, and appended below as Appendix C. The remand order of the Michigan Supreme Court is unreported as yet, and is appended below as Appendix D.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its opinion on October 14, 1987. Following a published opinion on an unrelated bond motion, reported at 431 Mich 673 (1988), the Michigan Supreme Court entered judgment on January 31, 1992. This Court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 3, 1986, a jury convicted Respondent of second-degree murder in the death of one Johnnie Fairbanks McLaughlin; on April 11, 1986, the trial court sentenced Respondent to 20-to-30 years imprisonment.

Testimony at trial established that police found McLaughlin's body in the morning hours of March 20, 1985, outside Respondents home, and that he had died of multiple blunt force injuries, including nine blows to the head and sixteen blows to the body, resulting in multiple fractures to the skull, ribs, hip, and legs. McLaughlin's hands had wounds which the medical examiner testified indicated a struggle; the examiner also testified that his injuries were not consistent with a fist fight. At the time of his death, McLaughlin was a medium-sized man, approximately 5'8" tall and weighing

153 pounds; and laboratory tests showed that his blood-alcohol level was .11% when he died.

Respondent did not testify at trial, but a prosecution witness read Respondent's statement to police into the record. According to his statement, he returned to his home at 11:30 pm on March 19, 1985, in a state of intoxication. After locking his doors and falling asleep on his couch, Respondent was awakened by a noise and arose; in the dining room, he was turned around by an unknown intruder and a struggle ensued. As they struggled into the kitchen, Respondent says that he realized his attacker was McLaughlin, who had been a houseguest of his until about two weeks earlier. As the two were wrestling, Respondent said that he felt something hard against his back, which he took for a weapon; during the struggle, Respondent

grabbed a table leg and began hitting McLaughlin with it, in an effort to survive. Finally overcoming the intruder, Respondent dragged McLaughlin to the door and threw him out onto the sidewalk.

Although McLaughlin did not have a key to the house, Respondent told police that there was a broken window on the back porch, which could provide entry; and Respondent told police that he believed that McLaughlin had broken into the house earlier, and had taken Respondent's radio and television set.

The police discovered McLaughlin's body just as Respondent was leaving the scene; the body appeared badly beaten, with torn clothing and multiple injuries. When Respondent returned, about two hours later, he appeared normal, with no apparent injuries. He permitted the police to enter his home, where they observed signs of an

extensive struggle, including broken furniture and blood in various parts of the house. The police discovered a three-foot long pipe, with traces of blood on it, sticking into a drain in the basement; in his statement, Respondent said that the pipe was placed their by his own father.

At trial, Respondent interposed self-defense, and requested instructions on the lesser offense of manslaughter. Finding insufficient evidence, the trial court declined to give the manslaughter instruction.

In his closing argument, the trial court permitted the prosecutor to make the following remarks, over defense objections:

> "We have the testimony of the officers who were at the scene when the defendant returned. And his appearance was normal. I believe he called it nonchalant, playing the innocent homeowner returning,

> opening the door. And then we contrast that with his statement that he admitted there was a fight.
>
> "When he arrived at the scene, does he say this guy broke in, this guy got in, I had a fight with him?....He says nothing. Just opens the door."

On appeal, the Michigan Court of Appeals reversed, on two separate grounds: first, the Court ruled that the trial judge erred in failing to give the requested manslaughter instruction; and secondly, the Court found that the prosecutor erred in referring to Redpondent's failure to say anything at the time the police confronted him at the scene of the killing.

On Petitioner's timely application, the Michigan Supreme Court remanded the cause to the Court of Appeals for reconsideration in light of three new state cases on the use of an accused's prearrest silence. On remand, the Michigan Court of Appeals affirmed its original holding, finding the cases

inapposite because one case dealt with custodial interrogation, and the other two dealt with impeachment and cross-examination, while the instant case involved prearrest silence, and a defendant who did not testify at trial.

On January 31, 1992, the Michigan Supreme Court denied Petitioner's second application for leave to appeal, over the dissent of one justice.

REASONS FOR GRANTING THE WRIT

In Jenkins v Anderson, 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (198), this Court held that the state could use an accused's prearrest silence to impeach his credibility on cross-examination, after he had taken the stand in his own defense at trial. This case presents the Court with the opportunity to consider application of the same principles in a case where the accused chooses not to testify: put simply, this case poses the question whether the prosecution may use an accused's conduct -- including his verbal conduct -- as part of its case-in-chief.

As this Court held in Chaffin v Stynchcombe, 412 US 17, 30; 93 S Ct 1977; 36 L Ed 2d 714 (1973), the Constitution does not forbid "every government-imposed chose in the criminal process that has the effect

of discouraging the exercise of constitutional rights." While it would be fundamentally unfair to penalize an accused for relying upon guarantees that his silence would not be used, Doyle v Ohio, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), no such unfairness follows from permitting the evidentiary use of a defendant's own behavior -- whether verbal or nonverbal -- when such behavior is relevant to an issue before the factfinder. As Justice Stevens noted in his concurrence to Jenkins: "[T]he privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." Jenkins, supra at 241. Rather, each party should be free to use the others' inconsistent behavior in speech and conduct to assist the factfinder in the pursuit of truth at trial. Anderson v Charles, 447 US 404; 100 S Ct 2180; 65 L Ed 2d 2180 (1980).

In this case, as in Jenkins, Respondent was under no compulsion to speak prior to his arrest. Moreover -- as in Jenkins -- Respondent did not, in fact, assert his Fifth Amendment rights, but rather proceeded to make a full statement. Under the circumstances, the claim that admitting evidence of conduct inconsistent with his voluntary statement somehow violates his right to silence is sophistry, and this Court should reject it.

Through its commendable restraint in deciding only the issue at bar, the Jenkins Court appears to have reserved consideration of the substantive use of a defendant's prearrest silence for a more appropriate time. Petitioner submits that this case presents a well-developed vehicle for exploring the issues the Jenkins Court left open; and given the conflicting opinions of jurisdictions around the country, compare,

eg, Rowan v Owens, 752 F2d 1186 (CA 7, 1984); United States v Goldman, 563 F2d 01 (CA 1, 1977) cert den 434 US 1067 (1978); United States v Shaw, 701 F2d 367 (CA 5, 1983), with Odell v State, 90 Wisc 149; 279 NW2d 706 (1979); People v Patterson, 170 Mich App 162; 427 NW2d 601 (1988); Commonwealth v Nickerson, 386 Mass 54; 434 NE2d 992 (1982); State v Merola, 214 NJ Super, 108; 6-518 NE2d 518 (1986); and Silvernail v State, 777 P2d 1169 (Alaska App, 1989), Petitioner submits that the time could hardly be more appropriate.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for further proceedings.

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Dated: February 26, 1992
JC/jlh

APPENDICES

APPENDIX "A"

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee Aug. 22, 1991
No: 137871
Supreme Ct. Remand

STANLEY LEE SLIGH,

Defendant-Appellant.

Before: Hood, P.J. and Gribbs and Sullivan, JJ.

PER CURIAM.

Defendant was convicted by a jury of second degree murder, MCL 750.317; MSA 28.549, and sentenced to a term of 20 to 30 years. Defendant appealed by right and this Court reversed his conviction in an unpublished per curiam opinion. People v Sligh, #93016, rel'd 10/14/87. Plaintiff appealed the matter to our Supreme Court and, in lieu of granting leave, these was remanded for our "pleanary reconsideration...in light of People v Cetlinski, 435 Mich 742 [460 NW2d 534] (1990), People v McReavy, 436 Mich 197 [462 NW2d 1] (1990),

and People v Sutton, 436 Mich 575 [464 NW2d 276] (1990)." We have reviewed the cases cited by our Supreme Court and find them to inapposite. The issue in this case involves defendant's silence in the presence of police officers moments before he was taken into custody. This case does not involve custodial interrogation as in McReavy, supra. Since defendant did not testify at trial, the decisions in Sutton and Cetlinski, supra, concerning impeachment and cross-examination are also inapplicable. Accordingly, we again reverse for the reasons stated in our prior opinion.

Reversed.

/s/Harold Hood
/s/Romad S. Gribbs
/s/Joseph B. Sullivan

APPENDIX "B"

Michigan Supreme Ct.
Entered: January 31, 1992

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, SC: 92346
COA: 137871
LC: 85-1931

STANLEY LEE SLIGH,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyld, J., dissents and states as follows:

In People v Collier, 426 Mich 23 (1986), we held that the Fifth Amendment does not control the admission or exclusion of evidence regarding the defendant's failure to come forward with an exculpatory explanation prior to arrest. The holding in People v Bobo, 390 Mich 355 (1973), was "confined to impeachment for and comment on

silence at the time of arrest in the face of accusation," Collier at 39, and the use of previous silence was to be evaluated as an evidentiary issue. In People v McReavy, 436 Mich 197 (1990), we held that, even where the Fifth Amendment is applicable, the silence of a defendant who waives his rights is admissible if it does not constitute a reinvocation of the privilege.

In the instant case, defendant came in contact with the police outside his home prior to arrest or accusation. He identified himself and let the police into the home where signs of a bloody struggle were found. After his arrest and after being advised of Miranda [1] rights, the defendant made a statement on which the defense at trial was predicated, that he was attacked in his home by an unknown intruder and had subdued him.

---

[1] Miranda v Arizona, 384 US 436 (1969).

I would grant leave to consider whether evidence of defendant's verbal conduct at the time he was first approached was properly admitted in the prosecution's case in chief, Jenkins v Anderson, 447 US 231 (1980), and, if so, I would remand for anew trial or entry of a conviction of manslaughter.

SIGNED

JACQUELINE MCKINNON

SEAL

APPENDIX "C"

STATE OF MICHIGAN
COURT OF APPEALS

Oct. 14, 1987

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No: 93016

STANLEY LEE SLIGH,

Defendant-Appellant.

Before: R.S. Gribbs, P.J., D.E. Holbrook, Jr. and N.J. Lambros, JJ.

PER CURIAM

Defendant, Stanley Lee Sligh, was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to a prison term of twenty to thirty years. Defendant appeals as of right, raising eight issues. We reverse.

This case arose out of the killing of Johnnie Fairbanks McLaughlin. McLaughlin's body was discovered at approximately 6:50 a.m. on March 20, 1985, outside defendant's house. McLaughlin had died of multiple blunt force injuries. Specifically, the deceased had received

nine blows to the head area and sixteen blows to the body, which resulted in fractures of his skull, ribs, right hip, and legs. The backs of the deceased hands had injuries which were indicative of a struggle. At the time of death, the deceased was 5'8" and weighed 153 pounds. He had a blood alcohol level of .11 and a blood urine of level of .16. It was the pathologist's opinion that the deceased's injuries were not consistent with a fist fight.

Although defendant did not testify at trial, the statement he made to the police on March 20, 1985, the morning of his arrest, was read into the record by the plaintiff. According to defendant's statement, at approximately 11:30 p.m. on March 19, 1985, he returned to his home in an intoxicated condition after locking the doors and falling asleep on this couch, he was awakened by a noise, got up, and was turned around in the dining room by

someone. He didn't know who the intruder was at that time, but they struggled and ended up in the kitchen. In the kitchen, defendant realized his attacker was McLaughlin, who had been staying at defendant's house until about two weeks prior to March 19, 1985. During the struggle, with things breaking, defendant grabbed at table leg and began hitting McLaughin. The deceased seemed strong to defendant and defendant said he was struggling to survive. When he was wrestling with McLaughlin, defendant felt something hard in his back, which he though might have been a weapon. After the struggle, defendant dragged McLaughlin to the door and threw him out on the sidewalk.

Defendant said that while the deceased did not have a key to his house, McLaughlin knew that there was a broken window on the back porch with a board over it which can be lifted and the lock pulled up to get in. Defendant believed that McLaughlin had earlier taken his television

and radio.

The police discovered decedent's body just as defendant was leaving the scene. Defendant returned about two hours later and allowed the police into his home. Decedent's body appeared badly beaten with his clothes ripped. Pictures of decedent's body were given to the jury over defendant's objection.

There was a trail of blood from decedent's body to the house. The scene inside the house revealed an extensive struggle. Broken items of furniture were strewn all over and blood was all over the place. A three foot long pipe with blood on it was discovered sticking into a drain filled with sludge in the basement. In his statement, defendant said that the pipe had been put there by his father.

According to the police, when defendant returned to his house, he appeared normal and did not have any apparent injuries or bruises.

At the close of proofs, defendant requested a manslaughter instruction which the trial court refused, concluding that the evidence did not support a manslaughter instruction. Instead, the trial court gave instructions on second-degree murder and self defense.

Defendant's theory at trial was one of self-defense. On appeal, defendant argues that the trial court committed reversible error when it refused to instruct on voluntary and involuntary manslaughter. Defendant claims that the evidence supported such a lesser included offense instruction.

Our Supreme Court, in People v Van Wyck, 402 Mich 266, 268; 262 NW2d 638 (1978), held:

> "... that manslaughter is not a necessarily included offense within the crime of murder but that it many nonetheless be an included offense if the evidence adduced at trial would support a verdict of guilty of that crime."

The established rule in Michigan is that if evidence has been presented which would

support a conviction of la lesser offense, refusal to give the requested instruction is reversible error. See People v Richardson, 409 Mich 126, 135; 293 NW2d 332 (1980).

In Van Wyck, supra, the Court explained the provocation which can mitigate murder to manslaughter:

> "But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." Maher v People, 10 Mich 212, 219 (1862). Id., 269.

Involuntary manslaughter arises when a death occurs without malice and unintentionally, and as a result of gross, criminal and culpable negligence or inadvertence. See Townsend, 125-126;

People v Parney, 98 Mich App 571, 585-586; 296 NW2d 568 (1979).

While we find this a close case, we must conclude that the trial court erred by refusing defendant's requested instruction on manslaughter. Plaintiff argues that the nature of decedent's wounds and the relative condition of the two bodies precluded any determination that a rational view of the evidence would support a charge of manslaughter. While we have considerable sympathy for this position, we cannot conclude that manslaughter is without support under a rational view of the evidence.

The killing occurred at defendant's home, sometime during the early morning hours of March 20, 1985. There was evidence presented to support the claim that defendant came home drunk, fell asleep, was awakened by an intruder, fought with the intruder, and feared for his life. The jury could have found this sufficient

provocation to justify a finding of manslaughter. We are not unmindful of the apparent excessiveness of the deceased's wounds and the apparent absence of injury to the defendant. It is our opinion that the determination of whether this evidence ultimately convinces the trier of fact that sufficient mitigation is not present to support a finding of manslaughter rather than murder, is properly for the jury to decide. We also find somewhat inconsistent that while the trial court did not give an instruction on manslaughter, it did given an instruction on self-defense. Finally, the reversible error occurred only in the trial court's refusal to give an instruction on voluntary manslaughter, not involuntary manslaughter. We do not believe that a rational view of the evidence supports any claim that the killing was unintentional. Nor does the killing otherwise come within the parameters of involuntary manslaughter.

Defendant has raised one other meritorious issue. Defendant asserts that reversible error occurred when the prosecutor commented in closing argument on defendant's exercise of his right to remain silent when initially confronted by the police, contrary to People v Bobo, 390 Mich 355; 212 NW2d 190 (1973).

During closing argument, the following dialog occurred:

> "We have the testimony of the officers who were at the scene when the defendant returned. And his appearance was normal. I believe he called it nonchalant, playing the innocent homeowner returning, opening the door. And then we contrast that with his statement that he admitted there was a fight.
>
> "When he arrived at the scene, does he say this guy broke in, this guy got in, I had a fight with him?
>
> "Mr. Curtis: Objection.
>
> "I withdraw the objection.
>
> "Mr. Connor: He says nothing. Just opens the door.
>
> "Mr. Curtis: Now, as to that, Your Honor, I am going to object. He knows quite well my client has no burden to make any statement at any time. And those statements he made, they recorded them and testified about them.

"The Court: I think this is evidence in the case. And I think inferences can be drawn. That is not a commentary on your client's right not to testify.

"Mr. Curtis: For purposes of the record, that objection is placed on People vs. Bobo."

Defendant's objection was overruled.

The above passage shows that the prosecutor was attempting to have the jury draw an adverse inference to defendant by virtue of his silence when confronted by the police at the scene of the killing. This was clearly improper.

In Bobo, our Supreme Court held that the prosecutor's questioning and comments in closing argument about defendant's failure to say anything to the police about two potential suspects running past him at the scene of the crime just prior to defendant being arrested were improper because they restricted:

"'the exercise of the constitutional right to remain silent in the face of accusation.' 390 Mich 359 (emplasis added). We went on to state that it made "little difference" whether the defendant's silence was prior to or at the time of arrest

because 'the defendant's Fifth Amendment right to remain silent is constant.' 390 Mich 360." People v Collier, 426 Mich 23, 30-31 (1986).

The Collier Court limited Bobo to only those situations where the state seeks to impeach a defendant with his silence maintained during contact with police officers. Id., 31. The Collier Court distinguished its facts from Bobo by noting that the "silence" alluded to be the prosecutor in that case occurred before any contact with the police. Id., 31. Here, the facts are not similar to Collier. The "silence" alluded by the prosecutor occurred during contact with the police at the scene of the crime. Moreover, unlike the case at bar, there was no objection to the prosecutor's comments in Collier. Thus, Bobo was violated and defendant's conviction must be reversed on this basis as well. We also note that the defendant in this case did not take the stand and therefore did not waive his privilege not to testify. Cf. Collier, 38-39.

We have reviewed defendant's remaining allegations of error and have found them to be without merit. Defendant's conviction is reversed and remanded for a new trial.

Reversed.

/s/Roman S. Gribbs

/s/Donald E. Holbrook, Jr.

/s/Nicholas J. Lambros

APPENDIX "D"

Michigan Supreme Ct.

Entered: January 29, 1991

81963

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

SC: 81963
COA: 93016
LC: 85-01931

STANLEY LEE SLIGH,

Defendant-Appellee.

By order of January 29, 1988, the application for leave to appeal was held in abeyance pending the decision in People v Cetlinski (Docket No. 81176), People v McReavy (Docket No. 80422), and People v Sutton (Docket No. 80844). On order of the Court, the decisions having been issued on September 11, 1990 [Cetlinski, 435 Mich 742 (1990)], September 19, 1990 [McReavy, 436 Mich 197 (1990)], and September 28, 1990 [Sutton (After Remand), 436 Mich 575 (1990)], the application is again

considered, and, pursuant to MCR 7.302 (F)(1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals for pleanary reconsideration, including the opportunity for rebriefing and oral argument, in light of People v Cetlinski, 435 Mich 742 (1990), People v McReavy, 436 Mich 197 (1990), and People v Sutton (After Remand, 436 Mich 575 (1990).

Seal CORBIN R. DAVIS, CLERK

January 29, 1991 SIGNED

CLERK